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and Clinics

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EQUALITY LAW PROTECTION FOR LEGAL EDUCATION: INTERNSHIPS, VOLUNTEERING AND CLINICS

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I INTRODUCTION

Law schools are increasingly focused on providing ‘practical’ legal education to equip their students for legal careers.¹ Recognising the fundamental limits of doctrinal education for preparing for legal practice,² demand is growing from both the legal profession and students themselves for legal education that is tailored to achieving professional skills and competencies, ensuring it is both ‘applied and useful’.³ Clinical legal education can build law students’ employability,⁴ confidence, sense of autonomy, and self-identity and purpose.⁵ Equally, though, it can expose students to deeply distressing and difficult content, which might negatively affect students’ mental health.⁶ Thus, while ‘practical’ legal education offers significant educational and personal benefits, it also comes with risks that need to be actively managed.

Beyond the formal curriculum, as graduate law positions become increasingly competitive to attain, law students are spending more time in firms, barristers’ chambers and community legal centres, to

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¹ Sadie Whittam, ‘Keep It Real: The Case for Introducing Authentic Tasks in the Undergraduate Law Degree’ (2023) 33(1) *Legal Education Review* 127, 128 (‘Keep It Real’).

² Rachel Spencer and Matthew Atkinson, ‘Towards a Pedagogy of the Integration of Clinical Legal Education Within The Law Curriculum: Using De-Identified Clinic Files Within Tutorial Programs’ (2015) 25(1) *Legal Education Review* 122–4 <<https://ler.scholasticahq.com/article/6301-towards-a-pedagogy-of-the-integration-of-clinical-legal-education-within-the-law-curriculum-using-de-identified-clinic-files-within-tutorial-programs>> (‘Towards a Pedagogy of the Integration of Clinical Legal Education Within The Law Curriculum’).

³ Whittam (n 1) 128–131.

⁴ Francina Cantatore, ‘Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects’ (2015) 25(1) *Legal Education Review* 147 (‘Boosting Law Graduate Employability’).

⁵ Anna Cody, ‘Developing Students’ Sense of Autonomy, Competence and Purpose Through a Clinical Component in Ethics Teaching’ (2019) 29(1) *Legal Education Review* 1.

⁶ Kate Seear, ‘Do Law Clinics Need Trigger Warnings? Philosophical, Pedagogical and Practical Concerns’ (2019) 29(1) *Legal Education Review* 1, 7 (‘Do Law Clinics Need Trigger Warnings?’).

strengthen their competitiveness on the job market.⁷ Hewitt and others thus describe practical work experience as becoming ‘pseudo mandatory’ for law graduates.⁸

There has been a resulting proliferation of legal internships, ‘volunteer’ placements in law firms, barristers’ chambers, and community legal centres, and pro bono law clinics in law schools. Clinical legal education (CLE) has now been incorporated into many Australian law schools, though programmes range from those that are wholly in-house at the law school; to those that are externally run, and supervised by those external to the law school, but with placement and assessment by the university (‘agency clinics’ or ‘externships’, including internships and placements).⁹

Thus, while some of these activities are conducted by and through law schools, some are conducted externally with law school oversight, while others are arranged independently by students themselves, or third-party providers. These trends are not confined to Australia; indeed, clinical legal education is a growing trend internationally, including in jurisdictions such as China.¹⁰ Hewitt and others therefore see this as part of a global trend of requiring extensive work experience to obtain a graduate-level job.¹¹

Despite the proliferation of ‘practical’ legal education, there has been less concern for how students participating in these ‘practical’ educational activities are protected by equality law. Indeed, in identifying the issues that should be considered by law schools developing pro bono programmes, protection of students was not one of the challenges identified by Corker¹² or Cantatore.¹³ This is a significant gap, given discrimination and sexual harassment are rife in the legal profession: in a 2019 survey conducted for the Victorian Legal Services Board and Commissioner, 61% of respondent women in the legal sector reported experiencing sexual harassment in their careers, higher than among women workers generally.¹⁴ Those with less experience in the legal profession are significantly more likely to report having been sexually harassed;¹⁵ this puts law students gaining

⁷ Anne Hewitt et al, ‘Weighing the Cost of Expectations That Students Complete Legal Work Experience’ (2022) 32(1) *Legal Education Review* 109, 109–110.

⁸ Ibid 111.

⁹ Adrian Evans et al, *Best Practices: Australian Clinical Legal Education* (2012) 4, 9 <<https://cald.asn.au/wp-content/uploads/2017/11/Best-Practices-Australian-Clinical-Legal-Education-Sept-2012.pdf>>.

¹⁰ Konstantin G Vertsman, ‘Legal Clinical Education in China: A Literature Review’ (2023) 33(1) *Legal Education Review* 25 (‘Legal Clinical Education in China’). Hewitt et al (n 7) 109.

¹¹ John Corker, ‘How Does Pro Bono Students Australia (PBSA) Fit with Clinical Legal Education in Australia?’ (2005) 8–10 <<https://probonocentre.org.au/wp-content/uploads/2015/09/HowdoesPBSAfitwithCLEinAustralia.pdf>>.

¹² Cantatore (n 4) 165–6.

¹³ Ipsos, *Sexual Harassment in the Victorian Legal Sector Report: 2019 Study of Legal Professionals and Legal Entities: Report of Findings* (2019) 18 <<https://lsbc.vic.gov.au/sites/default/files/2020-03/Sexual%20Harassment%20in%20the%20Victorian%20Legal%20Sector%20Report.pdf>>.

¹⁴ Ibid 25–28.

practical experience at particular risk. Experiencing sexual harassment during work experience is also not uncommon: in the 2021 National Student Safety Survey, of those who had experienced sexual harassment in an Australian university context in the past 12 months ($n = 4,140$), 5.9% of respondents reported experiencing sexual harassment while on work experience or a professional placement.¹⁶

This article therefore considers the scope of equality law, and how it applies to these different forms of ‘practical’ legal education activities. It considers how equality law applies to ‘volunteer’ positions, including those in law firm partnerships, barristers’ chambers, and community organisations, legal internships and law-school run legal clinics. It considers the complexity of the legal framework, and the resulting difficulties law students might have in asserting their equality rights. In Part II, I provide an overview of equality and discrimination law and its relevance for practical legal education. I then consider the application of equality law to practical legal education, as a form of education (Part III), work (Part IV) or services (Part V). I argue that discrimination by third parties represents a particular gap in discrimination law regulation for practical legal education (Part VI) and offer suggestions for how existing regulatory gaps might be addressed (Part VII). Part VIII concludes.

Discrimination laws in Australia vary across the states, territories and federally, representing a preliminary form of legal complexity.¹⁷ In this article, I focus particularly on the laws in Victoria, Queensland, and the federal *Sex Discrimination Act 1984* (Cth), given reforms to the *Sex Discrimination Act 1984* (Cth) to broaden its scope, and the relative progressiveness of the laws in Victoria and Queensland. While previous scholarship has considered the rights of those undertaking work experience under equality law, including in the Australian context,¹⁸ reform to equality legislation – particularly the *Sex Discrimination Act 1984* (Cth) – means it is timely to update this analysis. Further, previous scholarship has not focused on the challenges facing practical legal education specifically but considered work experience more generally. Legal education offers an important case study of the broader issues facing work experience participants, given the level of discrimination and harassment in the legal profession generally, and the complex arrangements that are in place for providing ‘practical’ legal education activities. This analysis is critical, too, for ensuring that those who offer and provide ‘practical’ legal education activities are aware of their legal

¹⁶ Wendy Heywood et al, *Report on the Prevalence of Sexual Harassment and Sexual Assault among University Students in 2021* (2022) 16 <https://assets.website-files.com/61c2583e4730cd5b054b8ab/623ba530bc6676dfcd1d5dc_2021%20NSS%20National%20Report.pdf>.

¹⁷ See Alysia Blackham, ‘Promoting Innovation or Exacerbating Inequality? Laboratory Federalism and Australian Age Discrimination Law’ (2023) 51(3) *Federal Law Review* 347 (‘Promoting Innovation or Exacerbating Inequality?’).

¹⁸ Alysia Blackham, ‘Working at the Edges of Legal Protection: Equality Law and Youth Work Experience from a Comparative Perspective’ in Andrew Stewart et al (eds), *Internships, Employability and the Search for Decent Work Experience* (Edward Elgar, 2021) 302.

obligations, and for identifying legal gaps that might inform law reform and change.

II EQUALITY AND DISCRIMINATION LAW: AN OVERVIEW

Equality and discrimination law can prove critical in ensuring law students have equitable access to practical legal education, are provided with reasonable adjustments for caring responsibilities or disabilities, and are protected from harassment or discrimination while undertaking legal education activities.¹⁹ Equality rights are potentially significant in this space, as the scope of equality law tends to be broader than for labour law generally: while most employment rights are only granted to ‘employees’, equality law often also protects those at the fringes of employment protection – such as students, volunteers and interns. However, as is mapped below, this coverage is often piecemeal, and differs depending on the jurisdiction, context, and the nature of the adverse conduct.

In the discussion below, I consider coverage of equality law for:

- university-run educational activities, which might be:
 - ‘in school’ (for example, a legal clinic run by the university as part of its curriculum, and supervised by university employees or external practitioners);
 - ‘out of school’ (for example, internships facilitated by the university, but hosted and supervised externally);
- ‘voluntary’ or unpaid external work experience or internship placements, without university oversight;
- paid external work experience or internship placements, without university supervision; and
- third-party brokered work experience or internship placements.

Law students undertaking practical legal education might experience discrimination or harassment from:

- the University itself, or university staff;
- legal practitioners supervising ‘in school’ activities, engaged by the University (as staff or volunteers);
- legal practitioners or other staff supervising ‘out of school’ activities, who are unlikely to be engaged by the university (as staff or volunteers);
- legal practitioners or other staff supervising ‘voluntary’ or unpaid external work experience or internship placements;
- legal practitioners or other staff supervising paid external work experience or internship placements (who might be regarded as an ‘employer’);
- third parties arranging or brokering work experience or internship placements;
- other staff or workers;

¹⁹ See further *ibid* 303–306.

- student peers; and/or
- clients, members of the community or general public.

The scope of equality law is likely to be highly fact-specific and will vary depending on the circumstances of each case. In the sections that follow, I consider the scope of equality law as it broadly relates to these different fact scenarios. This discussion is largely focused on statutory discrimination law, given the limited case law that has emerged in these areas.

III COVERAGE AS ‘EDUCATION’

Where practical legal education is offered as part of a course, is arranged or supervised by a university, or receives course credit, it may fall within the scope of the prohibition of discrimination in education.

In Queensland, under the *Anti-Discrimination Act 1991* (Qld) (ADA (Qld)), universities are captured within the definition of ‘educational authority’ and ‘educational institution’.²⁰ Indeed, ‘educational institution’ is defined broadly to include:

a school, college, university or other institution providing any form of training or instruction, and includes a place at which training or instruction is provided by an employer.

This is potentially broad enough to capture practical legal education activities, whether provided ‘in house’ or externally to the university. Educational authorities must not discriminate against students by denying or limiting access to any benefit arising from their enrolment, excluding a student, or ‘treating a student unfavourably in any way in connection with the student’s training or instruction’.²¹ However, educational authorities may discriminate against those with an ‘impairment’ if special services or facilities would be required, and providing those special services or facilities would ‘impose unjustifiable hardship’ on the authority.²² This obliges educational authorities to provide reasonable accommodations (‘special services or facilities’) that do not impose an unjustifiable hardship on the authority.²³

In Victoria, the *Equal Opportunity Act 2010* (Vic) (EOA (Vic)) defines ‘educational institution’ similarly, as ‘a school, college, university or other institution at which education or training is provided’;²⁴ it omits reference, though, to a place at which training is being provided by an employer. Discrimination against students and potential students by an educational authority is generally prohibited.²⁵

²⁰ *Anti-Discrimination Act 1991* (Qld) s 4, sch 1.

²¹ *Ibid* s 39.

²² *Ibid* s 44.

²³ *Ibid* ss 5, 44.

²⁴ *Equal Opportunity Act 2010* (Vic) s 4.

²⁵ *Ibid* s 38.

The EOA (Vic) also requires educational authorities to make reasonable adjustments for students with a disability.²⁶

The *Sex Discrimination Act 1984* (Cth) also prohibits discrimination by educational authorities running educational institutions – including universities²⁷ – on the basis of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding, in denying or limiting a student's access to any benefit or subjecting the student to any other detriment.²⁸ The *Disability Discrimination Act 1992* (Cth) further prohibits discrimination by educational authorities on the basis of disability.²⁹ It also prohibits:

- a) developing curricula or training courses having a content that will either exclude the person [with a disability] from participation, or subject the person to any other detriment; or
- b) by accrediting curricula or training courses having such a content.³⁰

This may mean that practical legal education activities, which exclude students with disabilities, are unlawful, unless avoiding the discrimination would impose an unjustifiable hardship on the university.³¹

The EOA (Vic) does prohibit sexual harassment of students by both employees and other students at education institutions.³² The ADA (Qld) contains a broad prohibition of sexual harassment, which likely encompasses all persons in education.³³ The *Sex Discrimination Act 1984* (Cth) also prohibits sexual harassment in educational institutions, by members of staff (against students or prospective students, and against students at other institutions in connection with their position); and by adult students (over the age of 16) (against other students or staff, or students or staff at other institutions in connection with their studentship).³⁴ The *Disability Discrimination Act 1992* (Cth) prohibits disability harassment in education, but only by staff.³⁵

If practical legal education is supervised, arranged, or assessed by a university, then, the university as an 'educational institution' is prohibited from discriminating against the students involved. Protection is also offered against sexual harassment by university employees and other students in all jurisdictions, and from staff and students at other institutions under the *Sex Discrimination Act 1984* (Cth). This protection is unlikely to extend to practical legal education which is not arranged or supervised by the university.

²⁶ Ibid s 40.

²⁷ *Sex Discrimination Act 1984* (Cth) s 4.

²⁸ Ibid s 21(2). Similar protection is offered against age discrimination in education: *Age Discrimination Act 2004* (Cth) s 26.

²⁹ *Disability Discrimination Act 1992* (Cth) s 22.

³⁰ Ibid s 22(2A).

³¹ Ibid s 29A.

³² *Equal Opportunity Act 2010* (Vic) s 98.

³³ *Anti-Discrimination Act 1991* (Qld) ss 118-20.

³⁴ *Sex Discrimination Act 1984* (Cth) s 28F.

³⁵ *Disability Discrimination Act 1992* (Cth) s 37.

IV COVERAGE AS ‘WORK’

A Discrimination

Where practical legal education involves an internship or placement, whether paid or unpaid, it might fall within the scope of ‘employment’ for the purposes of discrimination law.³⁶ Discrimination law generally prohibits discrimination at work; but not all those in the workplace are covered by the legislative definitions.

In Victoria, the EOA (Vic) defines ‘employee’ as including:

- a) a person employed under a contract of service, whether or not under a federal agreement or award;
- b) a person employed under the *Public Administration Act 2004* or appointed to a statutory office;
- c) a person engaged under a contract for services;
- d) a person who is engaged to perform any work the remuneration for which is based wholly or partly on commission.³⁷

In Part 6 of the Act, which relates to the prohibition of sexual harassment (and in relation to Part 6 only), the definition of ‘employee’ includes an unpaid worker or volunteer. When originally passed, the EOA (Vic) was drafted to extend the definition of ‘employee’ and ‘employer’ to include unpaid and volunteer work from 1 July 2012,³⁸ providing a transitional period for organisations to prepare for the commencement of the provisions.³⁹ However, these amendments – included in Part 17 of the original EOA (Vic) – were repealed by the *Equal Opportunity Amendment Act 2011* (Vic) s 33. Thus, while not the Parliament’s original intention, the EOA (Vic) now does not include unpaid or voluntary work within the definition of ‘employment’.

This may mean that some forms of practical legal education – which are unpaid, or ‘voluntary’ – do not fall within the employment protections offered by the EOA (Vic) in relation to discrimination. This is highly problematic, as employers’ responsibilities to accommodate parent or carer responsibilities will not extend to those who are not an ‘employee’ or being offered ‘employment’.⁴⁰ The requirement to provide reasonable adjustments is also limited to ‘employees’ and those

³⁶ Cf labour law generally: Andrew Stewart, ‘The Nature and Prevalence of Internships’ in Andrew Stewart et al (eds), *Internships, Employability and the Search for Decent Work Experience* (Edward Elgar, 2021) 17. Discrimination in the workplace is also regulated by the adverse action provisions in the *Fair Work Act 2009* (Cth). It is beyond the scope of this article to consider those provisions in detail; noting, though, that those provisions protect ‘employees’, prospective employees and independent contractors: s 342(1).

³⁷ *Equal Opportunity Act 2010* (Vic) s 4.

³⁸ Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 7. Referencing the *Equal Opportunity Act 2010* (Vic) Part 17, s 216 (as passed).

³⁹ Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 3.

⁴⁰ *Equal Opportunity Act 2010* (Vic) ss 17, 19. Despite those engaged under a contract for services falling within the definition of ‘employee’, there is still additional provision in the Act requiring accommodations for contract workers: ss 21, 22, 22A.

being offered ‘employment’.⁴¹ An absence of reasonable adjustments is likely to significantly limit the ability of people with disabilities to engage meaningfully in practical legal experience that is unpaid or ‘voluntary’, and conducted beyond the oversight of an educational institution.

This can be compared with the broader definition under the ADA (Qld), which defines ‘work’ as including that:

- a) in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment);
- b) under a contract for services;
- c) remunerated in whole or in part on a commission basis;
- d) under a statutory appointment;
- e) under a work experience arrangement;
- f) under a vocational placement;
- g) on a voluntary or unpaid basis;
- h) work by a person with an impairment in a sheltered workshop; and
- i) under a guidance program, an apprenticeship training program or other occupational training or retraining program.⁴²

This is broad enough to capture law students working in law firms, barristers’ chambers or community legal centres, whether they are paid or unpaid for the work they are doing, and whether the work is ‘work experience’ or an unpaid placement. This means that, in Queensland, those offering or supervising ‘practical’ legal education must not discriminate in deciding who should be offered an opportunity, the terms of that opportunity,⁴³ in denying access to a benefit or opportunity, dismissing a student, or in treating a student unfavourably in any way.⁴⁴ This is a far more protective approach than that in Victoria.

The *Sex Discrimination Act 1984* (Cth) limits its prohibition of discrimination to ‘employment’;⁴⁵ employment is defined as including:

- a) part-time and temporary employment;
- b) work under a contract for services (that is, self-employment); and
- c) work as a Commonwealth employee; and
- d) work as a State employee of a State.⁴⁶

Protection from discrimination is also explicitly extended to contract workers.⁴⁷ As in Victoria, though, what is missing, is

⁴¹ Ibid s 20.

⁴² *Anti-Discrimination Act 1991* (Qld) s 4, sch 1.

⁴³ Ibid s 14.

⁴⁴ Ibid s 15.

⁴⁵ *Sex Discrimination Act 1984* (Cth) s 14.

⁴⁶ Ibid s 4(1). A similar definition is adopted in the *Age Discrimination Act 2004* (Cth) s 5 and the *Disability Discrimination Act 1992* (Cth) s 4. The *Racial Discrimination Act 1975* (Cth) simply defines ‘employment’ as including ‘work under a contract for services’, that is, self-employment: s 3.

⁴⁷ *Sex Discrimination Act 1984* (Cth) s 16.

protection of unpaid or ‘voluntary’ work. A similar definition of ‘employment’ is adopted in the *Age Discrimination Act 2004* (Cth) s 5 and the *Disability Discrimination Act 1992* (Cth) s 4. Critically, then, reasonable adjustments are only required for those in ‘employment’, not those performing unpaid or ‘volunteer’ roles.⁴⁸

B Harassment

Legislative protection from sexual harassment at work tends to be broader in scope than protection from discrimination more generally. As noted above, in Victoria, the EOA (Vic) defines ‘employee’ as including an unpaid worker or volunteer *only* in relation to the prohibition of sexual harassment. The prohibition of sexual harassment in Victoria therefore extends to unpaid workers or volunteers, and is broader in scope than other discrimination prohibitions. However, the EOA (Vic) only prohibits sexual harassment, not harassment on the basis of other grounds.⁴⁹

Provision is also made to protect ‘employees’ (as broadly defined) from other workplace participants: the EOA (Vic) prohibits employees from harassing other employees.⁵⁰ There is also protection for those in common workplaces, whether or not they are ‘employees’ or employers, and whether or not they are engaged by the same employer. Section 94 says: ‘A person must not sexually harass another person at a place that is a workplace of both of them.’ A ‘workplace’ means:

any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment.⁵¹

This broad prohibition may be significant for those undertaking practical legal education, as it is not dependent on employment status, or the other party being employed. It is unlikely to be broad enough, though, to capture harassment by clients or the general public, as it is focused on those for whom the site is a ‘workplace’.⁵²

The ADA (Qld) also only contains prohibitions against sexual harassment, not harassment on the basis of other grounds.⁵³ However, this prohibition is framed broadly, and is not confined to certain contexts or relationships. The Act also prohibits vilification on the grounds of race, religion, sexuality or gender identity.⁵⁴ However, the absence of protection from harassment on the basis of other grounds is a noticeable gap in Queensland, as in Victoria.

⁴⁸ *Disability Discrimination Act 1992* (Cth) ss 5, 6.

⁴⁹ *Equal Opportunity Act 2010* (Vic) s 92.

⁵⁰ *Ibid* s 93(2).

⁵¹ *Ibid* s 94(3).

⁵² By contrast, the *Racial and Religious Tolerance Act 2001* (Vic), which relates to vilification rather than harassment, broadly relates to conduct by a ‘person’ in public: ss 7, 8, 12.

⁵³ *Anti-Discrimination Act 1991* (Qld) ss 118–19.

⁵⁴ *Ibid* s 124A.

The *Sex Discrimination Act 1984* (Cth) also has a broad scope in its prohibition of sexual harassment, following its expansion by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth). Building on work health and safety (WHS) law,⁵⁵ particularly the notion of a ‘person conducting a business or undertaking’ (PCBU), sexual harassment is now prohibited by:

- employers (against current employees or those seeking to become employees, and any other person in connection with being an employer);
- employees (against fellow employees and those seeking employment, and any other person in connection with being an employee);
- PCBUs (against workers or those seeking to become a worker, and any other person in connection with being a PCBU)
- workers (against fellow workers and those seeking to become a worker, and any other person in connection with being a worker); and
- other people, against workers or PCBUs, in connection with them being a worker or PCBU; and against employers or employees, in connection with them being an employer or employee.⁵⁶

‘Worker’ in a business or undertaking is defined broadly as someone who ‘carries out work’ for a PCBU.⁵⁷ ‘Person conducting a business or undertaking’, ‘worker’ and ‘workplace’ are given the same meaning as under the *Work Health and Safety Act 2011* (Cth).⁵⁸ ‘Worker’ is defined broadly in WHS law: a person is regarded as a worker ‘if the person carries out work in any capacity for a person conducting a business or undertaking’.⁵⁹ This includes work as:

- a) an employee; or
- b) a contractor or subcontractor; or
- c) an employee of a contractor or subcontractor; or
- d) an employee of a labour hire company who has been assigned to work in the person’s business or undertaking; or
- e) an outworker; or
- f) an apprentice or trainee; or
- g) a student gaining work experience; or
- h) a volunteer; or
- i) a person of a prescribed class.⁶⁰

This is potentially broad enough to capture those undertaking practical legal experience, as it explicitly includes volunteers and those gaining work experience. In the exceptional event those undertaking

⁵⁵ Every Australian jurisdiction except Victoria has adopted a model WHS law. Legislation adopting this model law has been enacted in each relevant jurisdiction.

⁵⁶ *Sex Discrimination Act 1984* (Cth) s 28B.

⁵⁷ *Ibid* s 28AB.

⁵⁸ *Ibid* s 4(1).

⁵⁹ *Work Health and Safety Act 2011* (Cth) s 7(1).

⁶⁰ *Ibid*.

practical legal experience are not classed as ‘workers’, though, there is no protection for workplace participants generally under the *Sex Discrimination Act 1984* (Cth) (compare WHS law, discussed below).

However, this exceptional case might be captured by the prohibition of hostile workplace environments,⁶¹ added by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth). The *Sex Discrimination Act 1984* (Cth) now makes it unlawful ‘to subject another person to a workplace environment that is hostile on the ground of sex.’ This applies broadly to a ‘person’, if:

- a) the first person engages in conduct in a workplace where the first person or the second person, or both, work; and
- b) the second person is in the workplace at the same time as or after the conduct occurs; and
- c) a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the second person by reason of:
 - i) the sex of the person; or
 - ii) a characteristic that appertains generally to persons of the sex of the person; or
 - iii) a characteristic that is generally imputed to persons of the sex of the person.⁶²

The circumstances to be taken into account include:

- a) the seriousness of the conduct;
- b) whether the conduct was continuous or repetitive;
- c) the role, influence or authority of the person engaging in the conduct;
- d) any other relevant circumstance.⁶³

Provision is also made for hostile environments arising for two or more reasons, so long as one reason is sex, whether or not sex is the dominant or substantial reason.⁶⁴

While the scope of the *Sex Discrimination Act 1984* (Cth) is now far broader in relation to sexual harassment, this extension has not applied to the Act’s other provisions, including those relating to discrimination. Further, the federal reforms have not applied to other federal discrimination statutes, such as the *Age Discrimination Act 2004* (Cth). Age-based harassment is not prohibited under the *Age Discrimination Act 2004* (Cth); but disability-based harassment is prohibited by the *Disability Discrimination Act 1992* (Cth). This protection is limited, though, to employees, those seeking employment, contract workers, and those seeking contract work.⁶⁵ The scope is therefore far more

⁶¹ *Sex Discrimination Act 1984* (Cth) s 28M.

⁶² *Ibid* s 28M(2).

⁶³ *Ibid* s 28M(3).

⁶⁴ *Ibid* s 8A.

⁶⁵ *Disability Discrimination Act 1992* (Cth) s 35.

limited than the *Sex Discrimination Act 1984* (Cth), and unlikely to capture unpaid or ‘volunteer’ work experience. The *Racial Discrimination Act 1975* (Cth) prohibitions of offensive behaviour because of race, colour or national or ethnic origin (the once contentious s 18C provisions) are framed broadly, applying to a ‘person’ doing acts in a public place.⁶⁶

V COVERAGE AS ‘SERVICES’

Where third-party providers are arranging or providing access to practical legal experience, including for a fee, this may be covered by equality law as provision of a ‘service’. Arguably, too, even the organisation itself providing practical legal experience might be providing a service to students.⁶⁷

The ADA (Qld) defines ‘services’ broadly as including ‘services of any profession, trade or business’.⁶⁸ The ADA (Qld) prohibits discrimination in supplying goods or services (whether or not for that supply is for reward or profit).⁶⁹ It is likely, then, that this is broad enough to cover those who arrange practical legal experience as a third-party service – and, potentially, even the organisations providing practical legal experience themselves – and would regulate discrimination by such providers. Discrimination against those with an ‘impairment’ in the provision of services is not unlawful if special services or facilities would be required, and providing those special services or facilities would ‘impose unjustifiable hardship’.⁷⁰ While this is not an explicit right to reasonable adjustments, it does flag the possibility of seeking ‘special services or facilities’ for those with a disability in service provision.

The EOA (Vic) adopts a similar definition of ‘services’ to that in Queensland,⁷¹ but explicitly excludes ‘education or training in an educational institution’ from the definition of ‘services’. This exclusion is not present in Queensland, and is likely to mean that ‘in house’ practical legal experience is not regarded as a ‘service’ (but is likely to be a form of education). As in Queensland, the EOA (Vic) prohibits discrimination in supplying goods or services (whether or not that supply is for payment).⁷² In Victoria, there is also a requirement for service providers to make reasonable adjustments for those with a disability, whether or not the service is provided for payment.⁷³ This may be a critical means of ensuring practical legal experience participants gain access to reasonable adjustments, even if they are not ‘employed’. The EOA (Vic) also prohibits sexual harassment in the

⁶⁶ *Racial Discrimination Act 1975* (Cth) s 18C.

⁶⁷ Blackham, ‘Working at the Edges of Legal Protection: Equality Law and Youth Work Experience from a Comparative Perspective’ (n 18) 315–317.

⁶⁸ *Anti-Discrimination Act 1991* (Qld) s 4, sch 1.

⁶⁹ *Ibid* s 46(1).

⁷⁰ *Ibid* s 51.

⁷¹ *Equal Opportunity Act 2010* (Vic) s 4.

⁷² *Ibid* s 44.

⁷³ *Ibid* s 45.

course of providing goods and services,⁷⁴ whether or not it is for payment.⁷⁵

VI DISCRIMINATION BY THIRD PARTIES

Liability for third party conduct becomes particularly relevant when a co-worker or other person in the workplace is the party responsible for the discrimination or harassment. In practical legal education, this may relate to the actions of supervising or assisting practitioners (particularly when acting as volunteers), the actions of clients, or other members of the public. Depending on the legislative framework, third party conduct might result in vicarious or direct liability for the employer,⁷⁶ or personal liability for the co-worker or third party themselves.

The ADA (Qld) prohibits discrimination by workers or agents⁷⁷ and makes educational authorities and employers vicariously liable for discrimination by their workers or agents in the course of work.⁷⁸ However, there is a defence to these vicarious liability provisions if the respondent can show that they took ‘reasonable steps’ to prevent the worker or agent contravening the Act.⁷⁹ This is potentially broad enough, though, to cover legal practitioners supervising or assisting with university-based clinics (whether they are paid or acting in a voluntary capacity), particularly given the broad definition of ‘work’ in the ADA (Qld). It is unlikely to cover the acts of clients or the general public, however.

The EOA (Vic) also provides for vicarious liability for discrimination or sexual harassment in the course of employment or while acting as an agent,⁸⁰ with a similar defence for taking ‘reasonable precautions to prevent the employee or agent contravening this Act.’⁸¹ Given the narrower definition of ‘employment’ in the EOA (Vic), when compared to Queensland, this may be less likely to capture the actions of volunteer practitioners, and is unlikely to cover the acts of clients or third parties.

As noted above, too, the prohibition of sexual harassment in Victoria may not be sufficiently broad to capture adverse behaviour by clients or the general public. That said, despite these limits, discrimination or harassment by third parties might be captured by the positive equality duty in the EOA (Vic). Section 15 imposes a duty on those who have a duty not to engage in discrimination, sexual harassment or victimisation to ‘take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or

⁷⁴ Ibid s 99.

⁷⁵ Ibid s 99(3).

⁷⁶ Such as, for example, for breach of a positive duty: *Anti-Discrimination Act 1998* (Tas) s 104.

⁷⁷ *Anti-Discrimination Act 1991* (Qld) s 114.

⁷⁸ Ibid s 133(1).

⁷⁹ Ibid s 133(2).

⁸⁰ *Equal Opportunity Act 2010* (Vic) s 109.

⁸¹ Ibid s 110.

victimisation as far as possible.’ This would potentially require measures to prevent discrimination or sexual harassment by those engaged by the organisation – including workers, however employed, and volunteers – but also potentially by third parties or clients. For example, in the Victorian Equal Opportunity and Human Rights Commission’s investigation of sexual harassment in retail franchises, which assessed Bakers Delight’s compliance with the positive duty to eliminate sexual harassment, it was recommended that Bakers Delight’s sexual harassment policies be amended, to specifically include harassment by customers.⁸²

In determining whether a ‘measure is reasonable and proportionate’, a number of factors must be taken into consideration, including:

- a) the size of the person's business or operations;
- b) the nature and circumstances of the person's business or operations;
- c) the person's resources;
- d) the person's business and operational priorities; and
- e) the practicability and the cost of the measures.

The duty is not directly enforceable by individuals, but may be taken into account in conciliating individual complaints.

A similar duty has now also been adopted in the *Sex Discrimination Act 1984* (Cth), following amendments by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).⁸³ Under s 47C, employers and persons conducting a business or undertaking ‘must take reasonable and proportionate measures to eliminate, as far as possible’ sex discrimination, sexual and sex-based harassment, hostile workplace environments and victimisation. Unlike the Victorian duty, however, this is confined to sex, and does not encompass other protected characteristics. That said, the duty in the *Sex Discrimination Act 1984* (Cth) expressly extends to preventing sexual harassment, hostile workplace environments and victimisation by third parties against workers and employees.⁸⁴ Further, the duty is enforceable by the Australian Human Rights Commission, by inquiring into compliance, issuing compliance notices and entering into enforceable undertakings.⁸⁵ This may prove to be more effective in practice than the Victorian duty.

⁸² Victorian Equal Opportunity and Human Rights Commission, *Preventing Sexual Harassment in Retail Franchises: Investigation under the Equal Opportunity Act 2010* (2022) 17
 <https://www.humanrights.vic.gov.au/static/0e635cd9874d974bcae48ecfecab4215/Resource-Investigations-Preventing_Sexual_Harrassment_in_Retail_Franchises.pdf>.

⁸³ See the detailed discussion in Belinda Smith, ‘Respect@Work Amendments: A Positive Reframing of Australia’s Sexual Harassment Laws’ (2023) 36 *Australian Journal of Labour Law* 145, 161–7.

⁸⁴ *Sex Discrimination Act 1984* (Cth) ss 28B(6), 28B(8), 28M, 47A, 47C(4)–(5).

⁸⁵ *Australian Human Rights Commission Act 1986* (Cth) ss 35B–35K.

In terms of personal liability for co-workers or third parties, in New South Wales,⁸⁶ Victoria,⁸⁷ Western Australia,⁸⁸ South Australia⁸⁹ and the Australian Capital Territory⁹⁰ the prohibition of discrimination is limited to ‘employers’; this is unlikely to capture co-workers or third parties. Under the *Age Discrimination Act 2004* (Cth), however, a co-worker may be personally liable for discrimination if they are ‘acting or purporting to act on behalf of an employer’.⁹¹ Personal liability is broad in Queensland,⁹² Tasmania,⁹³ and the Northern Territory:⁹⁴ those statutes simply say that ‘a person’ must not discriminate in work. This is potentially broad enough to cover other workers, and third parties at the workplace. The EOA (Vic) s 105 does provide, though, that ‘[a] person must not request, instruct, induce, encourage, authorise or assist another person to contravene’ the Act’s prohibitions of sexual harassment or discrimination.⁹⁵ A claim may be made against either or both of the enabling or harassing/discriminating parties.⁹⁶

VII ADDRESSING LEGAL GAPS

In summary, then, and as illustrated in Figure 1, the coverage of equality law for practical legal education is complex and fact-specific, and will depend on the nature of the harm. This, alone, can make enforcement challenging.⁹⁷ However, this discussion also reveals critical legal gaps, for third party harassment and discrimination, and harassment on grounds other than sex.

⁸⁶ *Anti-Discrimination Act 1977* (NSW) s 49ZYB(2). See *Gabryelczyk v Hundt* [2005] NSWADT 94.

⁸⁷ *Equal Opportunity Act 2010* (Vic) s 18.

⁸⁸ *Equal Opportunity Act 1984* (WA) s 66W.

⁸⁹ *Equal Opportunity Act 1984* (SA) s 85B.

⁹⁰ *Discrimination Act 1991* (ACT) s 10.

⁹¹ *Age Discrimination Act 2004* (Cth) s 18.

⁹² *Anti-Discrimination Act 1991* (Qld) s 15.

⁹³ *Anti-Discrimination Act 1998* (Tas) s 16.

⁹⁴ *Anti-Discrimination Act 1992* (NT) s 31.

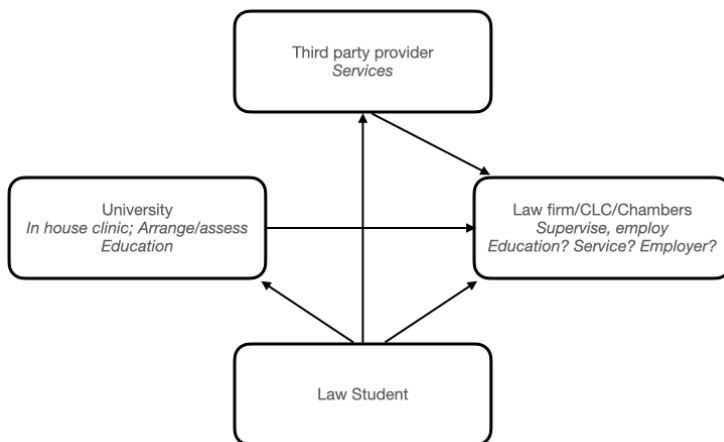
⁹⁵ *Equal Opportunity Act 2010* (Vic) s 105.

⁹⁶ *Ibid* s 106.

⁹⁷ On the challenges of enforcement in equality law generally, see Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) (*‘Reforming Age Discrimination Law’*).

Figure 1

Summary of potential equality law coverage for practical legal education activities



A *Third Party Harassment and Discrimination*

One way of addressing these gaps would be to make employers directly responsible for third party harassment and discrimination that occurs in their workplace. This is arguably already the case under workplace health and safety law (discussed further below). It was also the case previously under the *Equality Act 2010* (UK). Until 30 September 2013, third party harassment was regulated by s 40 of the *Equality Act 2010* (UK). Under those provisions, an employer (A) would be treated as harassing their employee or employment applicant (B) if:

1. a third party (other than A or an employee of A's) harassed B in the course of B's employment; and
2. A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so; and
3. A knew that B had been harassed in the course of B's employment on at least two other occasions by a third party.

It did not matter whether the third party was the same or a different person on each occasion. This provision has since been removed⁹⁸ as part of the UK government's 'red tape challenge' to remove unnecessary regulation, despite limited support for the repeal.⁹⁹ Attempts to reinstate protections for third-party harassment – via the

⁹⁸ *Enterprise and Regulatory Reform Act 2013* (UK) (c. 24) s 65.

⁹⁹ Government Equalities Office, *Equality Act 2010: Employer Liability for Harassment of Employees by Third Parties: Government Response to the Consultation* (October 2012) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20130125150853/http://www.homeoffice.gov.uk/publications/about-us/consultations/third-party-harassment/consultation-response?view=Binary>>.

Worker Protection (Amendment of Equality Act 2010) Bill 2023 (UK) – were abandoned, with the third-party provisions being removed from the Bill.

The removal of third-party harassment from the *Equality Act 2010* (UK) has created a noticeable lacuna in protection under UK equality law (as in Australia), particularly given the prominence of fissured employment relationships in modern workplaces.¹⁰⁰ In *Gillett v TFHC Ltd*,¹⁰¹ for example, the claimant's employer was held to not be liable for comments made by a third party, in this case, senior managers employed by the respondent's German parent company. The senior manager was not an employee of the respondent, and the respondent could therefore not be held liable for his comments.¹⁰² There was no other basis on which the respondent could be held liable for the senior manager's behaviour.¹⁰³ The claim therefore failed.

In *Gosling v Harding*,¹⁰⁴ the claimant was allegedly harassed by the respondent's wife, who worked as a sole trader at the same location as the claimant and respondent, but in a separate business. The Employment Tribunal (ET) held that the respondent's wife was not an employee of the respondent's business and, while she acted as the respondent's agent from time to time, that agency relationship did not extend to these particular interactions with the claimant.¹⁰⁵ The respondent was therefore not liable for these interactions.

That said, despite the changes to s 40, some UK cases have still found employers liable for third party harassment. In *Kopec v BDW Trading Ltd*,¹⁰⁶ for example, the claimant successfully brought a claim for third-party ethnicity and sexuality harassment against the respondent employer. In that case, it was held that the employer's failure to abide by its own policy relating to third-party harassment was a breach of trust and confidence,¹⁰⁷ which amounted to constructive dismissal. The ET held that a failure to abide by the employer's own policy amounted to harassment in and of itself:

the Tribunal unanimously concluded that the Respondent's failure to take seriously and to investigate the abuse suffered by the Claimant ... greatly exacerbated and perpetuated the hostile, degrading, humiliating and offensive environment which this third party verbal abuse created for him. The Respondent's failure to protect an employee in the workplace from racist and/or homophobic abuse was entirely contrary to the Respondent's own avowed and explicit policies, of which management at the material time were wholly ignorant, and was a serious matter which in itself had the

¹⁰⁰ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) 1 ('*The Fissured Workplace*').

¹⁰¹ [2017] UKET 24043/70.

¹⁰² Ibid [7.3].

¹⁰³ Ibid.

¹⁰⁴ [2019] UKET 2501261/2018.

¹⁰⁵ Ibid [49], [51], [56]. See also [54].

¹⁰⁶ [2019] UKET 22071/11.

¹⁰⁷ By contrast, an implied term of trust and confidence in employment contracts has not been accepted by Australian courts: *Commonwealth Bank of Australia v Barker* [2014] HCA 32, (2014) 253 CLR 169.

effect of violating the Claimant's dignity and, at least in part, creating the hostile, degrading, humiliating and offensive environment in which he found himself. The Tribunal concluded that this failure to act in relation to harassment by third parties in the workplace fell within the ambit of 'conduct related to' the relevant protected characteristics, within the meaning of section 26 of the Act.¹⁰⁸

The former UK provisions offer one model that could be adopted in Australian discrimination law for regulating third-party harassment; another approach to strengthening discrimination law might be one modelled on workplace health and safety (WHS) law. For example, the *Work Health and Safety Act 2011* (Cth) provides that:

A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

- a) workers engaged, or caused to be engaged by the person; and
- b) workers whose activities in carrying out work are influenced or directed by the person;

while the workers are at work in the business or undertaking.¹⁰⁹

A person conducting a business or undertaking (PCBU) must also:

ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.¹¹⁰

As noted above, 'worker' in WHS law is defined broadly. A person is regarded as a worker 'if the person carries out work in any capacity for a person conducting a business or undertaking'.¹¹¹ This includes work as a student gaining work experience or a volunteer.¹¹²

Duties under WHS law extend to any person at the workplace: 'a person at a workplace' must:

- a) take reasonable care for his or her own health and safety; and
- b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
- c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with the Act.¹¹³

'Workplace' is also defined broadly, as being 'a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.'¹¹⁴ This is broad enough to capture clients and third parties who might be present at a

¹⁰⁸ *Kopec v BDW Trading Ltd* [2019] UKET 22071/11 [66].

¹⁰⁹ *Work Health and Safety Act 2011* (Cth) s 19(1).

¹¹⁰ *Ibid* s 19(2).

¹¹¹ *Ibid* s 7(1).

¹¹² *Ibid*.

¹¹³ *Ibid* s 29.

¹¹⁴ *Ibid* s 8(1).

workplace;¹¹⁵ it is also broad enough to capture the varied places in which practical legal education might be undertaken.

While WHS law might be broad enough to capture some of the issues of concern in this article, this is not a reason to fail to reform the scope of equality law. While WHS law might be used to protect those who experience discrimination and harassment at work, it appears uncommon for this to occur in practice, at least at present.¹¹⁶ Smith and others identify two critical barriers to realising the potential of WHS law for preventing sexual harassment at work: WHS agencies might not recognise that their remit extends to discrimination and harassment, and its psychosocial impacts; and/or they may not be equipped to deal with discrimination and harassment.¹¹⁷ As the authors conclude:

Unless WHS agencies accept that sexual harassment is a psychosocial hazard that falls within the scope of harms to be prevented under WHS laws, the agencies will not convey this to duty-bearers. Without this acknowledgment, both compliance and enforcement activities will be too narrow in scope.¹¹⁸

Since Smith and others wrote on WHS law, there have been some notable developments in this space, to support capability-building for WHS agencies, and to improve relevant guidance for employers. In 2022, Safe Work Australia released a model Code of Practice on managing psychosocial hazards at work, which explicitly lists harassment (but not discrimination) as a potential psychosocial hazard.¹¹⁹ The Code also expressly recognises that ‘harmful behaviours’ – including harassment – can be occasioned by both internal and external parties:

Harmful behaviours can come from a range of sources including:

- External behaviours from customers, clients, patients, members of the public or from other businesses (e.g. between a plumbing and an electrical sub-contractor at the same work site, or a delivery person and a retail worker).
- Internal behaviours from other workers, supervisors or managers.¹²⁰

¹¹⁵ Richard Johnstone, ‘The Australian Regulatory Framework for Preventing Harassment and Bullying at Work’ in Loïc Lerouge (ed), *Psychosocial Risks in Labour and Social Security Law: A Comparative Legal Overview from Europe, North America, Australia and Japan* (Springer International Publishing, 2017) 253, 256.

¹¹⁶ Belinda Smith, Melanie Schleiger and Liam Elphick, ‘Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws’ (2019) 32 *Australian Journal of Labour Law* 219.

¹¹⁷ Ibid 26.

¹¹⁸ Ibid.

¹¹⁹ Safe Work Australia, ‘Managing Psychosocial Hazards at Work: Code of Practice’ (July 2022) 18 <https://www.safeworkaustralia.gov.au/sites/default/files/2022-08/model_code_of_practice_-_managing_psychosocial_hazards_at_work_25082022_0.pdf>. Though discrimination is flagged later in the code: Ibid 19.

¹²⁰ Ibid 48.

Hopefully this Code will lead to a stronger focus on the psychosocial and physical risks of discrimination and harassment at work.

Rather than meaning there is no need to reform equality law, though, WHS law offers a potential model for strengthening equality statutes to address existing gaps. Indeed, unlike WHS agencies, equality law regulators are experts in discrimination and harassment, and clearly see this as part of their remit. The barriers to the effectiveness of equality law are therefore quite different to those in the WHS space; the two fields of regulation are potentially complementary, and improvements can be sought to both areas simultaneously.

B *Harassment on Grounds Other than Sex*

The equality law provisions canvassed above generally offer significant and broad protection against sexual harassment; but the statutes in Victoria and Queensland both omit any protection for harassment on the basis of other protected characteristics. The *Age Discrimination Act 2004* (Cth) offers no protection against age-based harassment. This is a significant legal gap.

The Australian status quo may be compared with the *Equality Act 2010* (UK), which offers protection against harassment on the basis of age; disability; gender reassignment; race; religion or belief; sex; or sexual orientation.¹²¹ ‘Harassment’ is defined as where:

- a) A engages in unwanted conduct related to a relevant protected characteristic, or unwanted conduct of a sexual nature, and
- b) the conduct has the purpose or effect of—
 - i) violating B's dignity, or
 - ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

This seems an important prohibition to include in the Australian context, for all protected characteristics.

VIII CONCLUSION

Despite the proliferation of practical legal education activities, there has been limited scholarly consideration of how students participating in these activities are protected from the risks of participation. In particular, this article has mapped how students experiencing discrimination and harassment might fall into legal gaps between the spheres of education, work and services, particularly where undertaking unpaid or ‘voluntary’ activities. While it is likely that practical legal education activities are covered in some way by equality law, the coverage is often unclear and arguable, and varies significantly across

¹²¹ *Equality Act 2010* (UK) s 26.

jurisdictions. This is likely to inhibit access to justice, and further restrict the individual enforcement of equality law.¹²²

This article concludes, then, with suggested reforms to streamline and strengthen equality laws in Australia. First, a broad definition of ‘work’ should be adopted in equality law, reflecting that of the ADA (Qld) and the original drafting of the EOA (Vic), to explicitly include volunteer and unpaid positions. Second, equality laws should prohibit harassment on the basis of all protected characteristics (as in the UK), and by all workplace participants (as under WHS law). Third, PCBUs should be made explicitly liable for, and responsible for preventing, third-party harassment and discrimination (as under WHS law). While reform to the *Sex Discrimination Act 1984* (Cth) has significantly extended the scope of protection, particularly for sexual harassment, there is significant reform still required to extend this protection to other protected grounds, to encompass discrimination as well as harassment, and to extend this reform to other jurisdictions. As practical legal education activities continue to expand in scope, so too must equality law, to protect some of the most vulnerable members of the legal profession.

¹²² See, eg, Blackham, *Reforming Age Discrimination Law* (n 97); Blackham, ‘Promoting Innovation or Exacerbating Inequality?’ (n 17).